MAHKAMAH PERUSAHAAN MALAYSIA

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at the PERKESO Seminar

on 23 - 25 January 2015

Holiday Inn Resort, Batu Feringghi, Penang.

" WHETHER THE DECISION OF THE MEDICAL BOARD AND MEDICAL APPELLATE BOARD IS FINAL AND BINDING ON THE SOCIAL SECURITY APPELLATE BOARD "

Introduction

The **Employees' Social Security Act 1969** (ESSA 1969) provides benefits under 2 social insurance schemes namely the Employment Injury Insurance Scheme and the Invalidity Pensions Scheme. The latter provides for payment of certain benefits where an employee becomes invalid due to illness or any other reason. It is entirely administered by Perkeso established under the ESSA 1969. Perkeso is an organisation set up to administer, enforce and implement the ESSA 1969 and its accompanying Regulations 1971.

What is invalidity? Invalidity means a serious disease or disablement of a permanent nature that is either incurable or not likely to be cured as a result of which an employee is unable to earn at least. It refers to a morbid condition of a permanent nature that renders the workman incapable of engaging in any substantially gainful activity. The terms "morbid condition of a permanent nature" and "incapable of engaging in any substantially gainful activity" is explained in the ESSA 1969.

An aggrieved whose claim under the ESSA 1969 has been rejected may appeal to the Social Security Appellate Board more commonly known as the SSAB. The matters to be decided by the SSAB is listed in **sect. 84(1)** of the ESSA 1969. It provides inter alia that a question/dispute pertaining to the rights of any party to any benefits and as to the amount and duration subject to the provisions of subsection (3) shall be determined by the SSAB in accordance with the provisions of this Act.

What is subsection (3)? It states that in any proceedings before the SSAB an invalidity or disablement question arises the SSAB shall direct Perkeso to have the question decided by a Medical Board if it has not been obtained and shall proceed with the determination of the claim or question before it in accordance with the decision of the the Medical Board or the Appellate Medical Board.

The Medical Board

Section 32 of the ESSA 1969 provides that questions of invalidity or disablement shall be determined by a Medical Board constituted in accordance with the provisions of the Regulations. [**Sect. 15** of the ESSA 1969 provides that the insured persons, their dependants shall be entitled to invalidity pension certified by a Medical Board duly appointed in such manner as prescribed by the Regulations].

Regulations 46 to 56 of the ESS Regulations 1971 in particular Regulation 47 and 48 provides for the reference of invalidity question to a Medical Board for its decision. **Regulation 48** states that the Medical Board after examining the workman for the invalidity pension sends its decision on such form as maybe specified by Perkeso. Any appeal from the Medical Board's decision lies to the Medical Appellate Board (Regulation 81) within 90 days. (See forms).

NB: that is all that is provided for in so far as the the format of the medical report is concerned. A comparison with the provisions regulating disablement benefits can be made at this stage. **Regulation 58** states that no medical certificate shall be issued except by the Insurance Medical Practioner and the Insurance Medical Practioner shall examine and if in his opinion the condition of the insured so justifies, issue to such insured person any medical certificate reasonably required by such insured person.

Regulation 59(1) states that the medical certificate shall be Form 13 written in the own handwriting of the Insurance Medical Practioner and shall contain a concise statement of the disablement which in his opinion renders a person temporarily incapable of work. The statement of the disablement in the medical certificate shall specify the nature thereof as precisely as the Insurance Medical Practioner's knowledge of the condition of the insured person at the time of the examination permits.

NNB: However these regulations do not apply to invalidity claims and the corresponding certification thereof by the Medical Board who are required to verify the invalidity in such manner as prescribed by the Regulations.

Is the Invalidity Question, A Medical Answer?

In **Ketua Pengarah Pertubuhan Keselamatan Sosial v. Rahim Darus (2001) 2 CLJ 587** it was held that an employee is entitled to invalidity pension only when the Medical Board or Appellate Medical Board has concluded that he is an invalid. The Medical Board it was held shall so certify that if by reason of a morbid condition of a permanent nature the employee is incapable of engaging in any substantial gainful activity. It was held that the Medical Board and the Appellate Medical Board has the exclusive right to decide on issues of invalidity or disablement as they involve medical questions which would best be answered by the medical profession and jurisprudence. It is said that the SSAB comprising of legally qualified persons would not be competent to decide on such issues.

Qst: can an appeal lie to the SSAB where the agrieved is dissatisfied with a decision of the Medical Board? **Rahim Darus Case (supra)** states that the aggrieved has a right of appeal to the Appellate Medical Board if dissatisfied with the decision of the Medical Board. [**See s.33(2)**].

NB: Section 32A – whether the relevant accident or disease has resulted in the invalidity.

Section 33.(1) the case of any unsured person for invalidity pension or for permanent disablement benefit shall be referred by the Organisation to a medical board for determination of the invalidity question or the disablement question as the case may be, and if, on that or any subsequent reference, the extent of loss of earning capacity of the insured person is provisionally assessed, it shall again be so referred to the medical board not later than the end of the period taken into account by the provisional assessment.

Section 33.(2) if the insured person or the Organisation is not satisfied with the decision of the medical board, the insured person or the Organisation May appeal in the prescribed manner and within the prescribed time to the appellate medical board constituted in accordance with the provisions of the regulations.

However **Section 91(1)** of the ESSA 1969 provides that the SSAB has no appellate jurisdiction over the Appellate Medical Board as interpreted by the High Court in **Rahim Darus Case (Supra).** The ESSA 1969 talks about only 2 appellate boards and that is the SSAB and the Appellate Medical Board. Hence it is concluded that pursuant to **Section 91(1)** no appeal lies against the decision of the the Appellate Medical Board to the SSAB. This is fortified by the fact that

the ESSA 1969 allows for the Medical Board and the Appellate Medical Board to review its own decision [s.34]. It does not give the power to review to a body or person with superior jurisdiction.

NB: Section 91 of Act:

(1) Save as expressly provided in this section, no appeal shall lie from an order of the appellate boards set up by or under this Act.

(2) An appeal shall lie to the High Court from an order of an appellate board set up by or under this Act if it involves a substantial question of law.

(3) The period of limitation for an appeal under this section shall be sixty days from the date the order is made.

Mary Puspham Savarimuthu v. Ketua Pengarah Pertubuhan Keselamatan Sosial [2006] 7 CLJ 511 (a case decided by the High Court) decided that the SSAB has no power to determine whether a person qualifies for invalidity pension. Power lies it was held with the Medical Board telling us that the invalidity question is clearly a medical answer. It was held that the matter was within the jurisdiction of the Medical Board and the Appellate Medical Board. Citing **sect. 84(3)** it was held that the SSAB is precluded from deciding on the issue of invalidity or disablement.

It would seem that the SSAB then is constituted to adjudicate any dispute or claim stipulated under **section 84** of the ESSA 1969 with no powers to review or to entertain appeal over the decisions of the Medical Board or the Appellate Medical Board. This has been religously followed through over the years by the SSAB.

NB: Section 84(1) If any question or dispute arise as to:

(a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution:

(b) the rate of wages or average daily wages of an employee for the purposes of this Act; or

(c) the rate of contribution payable by a principal employer in respect of any employee; or

(d) a person who is or was the principal employer in respect of any employee; or

(e) the right of any person to any benefit and as to amount and duration thereof:

(f) any direction issued by the Organisation under section 35 and 36 on a review of any payment of invalidity pension or dependants' benefit or survivors' pension respectively; or

(g) Deleted.

(h) any other matter which is in dispute between a principal employer and the Organisation, or between a principal employer and an immediate employer, or between a person and the Organisation or between an employee and a principal or immediate employer, in respect of any contribution or benefit or other dues payable or recoverable under this Act, or any other matter required to be or which May be decided by the Board under this Act.

such question or dispute subject to the provisions of subsection

(3) shall he decided by the Board in accordance with the provisions of this Act.

(2) Subject to the provosions of subsection (3), the following claims shall be decided by the Board, namely:

(a) claim for the recovery of contributions from the principal employer;

(b) claim by a principal employer to recover contributions from any immediate employer;

(c) Deleted.

(d) claim against a principal employer under section 48;

(e) claim under section 50 for the recovery of the value of amount or the benefits received by a person when he is not lawfully entitled thereto; and

(f) any claim for the recovery of any benefit admissible under this Act.

(3) If in any proceedings before the Board an invalidity or disablement question arises and the decision of a medical board or appellate medical board has not been obtained on the same and the decision of such question is necessary for the determination of the claim or question before the Board, the Board shall direct the Organisation to have the question decided by this Act and shall thereafter proceed with the determination of the claim or question before it in accordance with the decision of the medical board or the appellate medical board, as the case may be.

More recently in the case of **Murali a/l Muniandy v. Ketua Pengarah Pertubuhan Keselamatan Sosial (2007)** where it was held by the High Court that the Court cannot inquire into and review the decision of the Appellate Medical Board a such an appeal is not within the terms of **s.91(2)** of ESSA 1969. It was held that the legislature intended that the question of invalidity or disablement to be decided by medical specialists in the Medical Board and Appellate Medical Board exclusively and that their decisions are final conclusive and not appealable.

In **Sithamah Yarayah v. Ketua Pengarah Pertubuhan Keselamatan Sosial (2012) 1 LNS 1106** the High Court held that **sect. 84(3)** ESSA 1969 was clear in that the question of invalidity or disablement should be referred to the Medical Board and Appellate Medical Board. It was further held that pursuant to **sect. 84(5)** of ESSA 1969 the Civil Court has no jurisdiction to decide on this issue.

NB: Section 84(5) No Civil Court shall have jurisdiction to decide or deal with any question or dispute which by or under this Act is to be decided by a medical board or by an appellate medical board.

A recent decision by the SSAB can be seen in the case of **Selvarajoo a/l Veeran v. Ketua Pengarah Pertubuhan Keselamatan Sosial [JRKS (S) 92/2012]** where, it was held that where the insured claims for invalidity pension under **sect.17** of the ESSA 1969 appeals to the SSAB the SSAB has jurisdiction to decide on the claim in reference to **s.84(2)(f)**. However subsection (3) thereto states that the SSAB has to obtain the decision of the Medical or Appellate Medical Board and once obtained it decides in accordance with the decision of the Medical Board. Perusing the written decision of the SSAB it will be noticed that the Chairman gleaned the Medical Report in detail and the Medical Board's reasons as to why the workman was found to be not entitled to invalidity pension. The crux here was that rehabilitation of the workman was needed for him to be able to return to work. And the SSAB took the view that if rehabilitation failed and he cannot return to work then it would mean that the workman was an invalid. It was held that the insured can bring his grievance before the SSAB for determination. On 10 September 2013 the High Court has upheld the decision of the SSAB. The matter is pending at the Court of Appeal.

It is my considered view that this approach is right in that the SSAB should look closer at the Medical Report that is before the Board each time there is an appeal on the issue of invalidity.

Let's have a look at the practices in some countries.

(1) India

In **Rahim Darus Case** the High Court considered the **Employee's State Insurance Act 1948** where **s.75(A)** ranking pari materia with our **s.84(3)** was amended to empower the employee's Insurance Court to determine all the issues where an appeal has been filed before it.

Where military pensions are concerned in India its guide requires the medical reports and opinion to be supported by proper reasoning so that a layman will be able to know why the illness is not sufficient to render him invalid. It has been held that the opinion of the Medical Board in such cases should be given primacy in deciding cases of invalidity and disablement. The Courts should not ignore its recordings and findings for reasons that the Medical Board is specialised authority composed of expert medical doctors and is recognised as the authority to give opinions regarding attributability and aggravation of the disability etc. therefore its opinion must be given due weight valuer and credence. However in several cases it has been held that the Medical Boards do not decide cases they only express their opinion to assist the Pension Sanctioning Authority and Board.

In the case of the **Union of India & Ors v. Keshar Singh SCC 675** the Supreme Court held that the medical opinion must be given due weight but there has to be some discernible basis of medical opinion. For eg. it held mere words "not attributable to...." without giving reasons cannot be acepted as conclusive. It was held in the absence of any reason whatsoever for the opinion medical opinion can't be treated as conclusive.

In **Navin Chandra v. Union of India & Ors (2006) SCT 626 (Delhi)** it was held that the opinion of the Medical Board must be self-contained and well-reasoned and supported by documentary prove and therefore it is not without basis.

In the **Union of India & Ors v. Exp Sepoy Ranjit Singh (LPA No: 547 of 2001)** it was held that the negative opinion given by the Medical Board without any basis could not be treated as conclusive. Thus it may be arbitrary in ignoring certain facts.

What can be gleaned from these cases is that:

(a) The Medical Board should make it their responsibility to ensure that opinions are supported by cogent reasons.

(b) Medical records of the Medical Board reports pertaining to the formation the medical opinion must be closely scrutinised. Their duties and responsibilities should not be discharged in a very perfunctory manner. Its approach to the core issue of determination should not appear to be casual. Otherwise their opinion in question can appear to be quite arbitrary lackadaisical for the simple reason that no plausible explanation conforming to scientific study of medical science has offered to indicate as to how they derive that the workman does not suffer from invalidity etc.

NB: it is mandatory for the Medical Board to follow the guidelines laid down in the Regulations. Their opinions and findings must be supported by proper reasoning so that a layman will be able to know why the illness does not qualify him for invalidity pension. Devoid of any reasoning or evidence it is a sheer case of non-application of the mind by the Medical Board.

Yes, the Courts are extremely loathe to interfere with the opinion of the experts. Opinions of the experts deserve respect but not worship and quasi-judicial forums like the SSAB and the judicial forums

entrusted with the task of deciding disputes should examine the record of the Medical Board for determing whether or not its conclusion reached is legally sustainable.

(2) The United States

Workers compensation is administered on a state by state basis. But they have a common feature. Their equivalent of the SSAB the Employees Compensation Appeals Board has addressed the role of the Medical Board in some states. They have stated that their role is to act as a consultant in reviewing cases under the Act. It has been held that the Medical Board should not adjudicate but attend to medical questions which are appropriate. The Board/Court give a liberal construction to the Act to effectuate the human purposes for which the Workers Compensation Act was enacted. It is emphasised that all medical opinions must be considered but acceptance of the opinion is not required. It has been held in several cases that the weight and credit to be given to expert testimony is a question exclusively for decision by the fact-finder making the opinions of the expert advisory and binding the fact-finder only to the extent to which credence is given to the opinion. Thus the Board may accept the testimony of one expert over the testimony of another.

Further the rejection of an expert medical opinion is within the authority of the Board. As the Board is not absolutely bound to accept such expert opinions even when uncontroverted: **Fulton County Board of Education v. Taylor 262, Ga. App 512, 586, S.E 2d 51 (2003)**. Therefore the Board is free to accept the testimony of one doctor over another or reject an expert medical opinion outright.

In **Reliance Insurance Co v. Cushing, 132 Ga. App 179, 207, S.E 2d 664 (1974)** it was held that the opinions of the medical experts are advisory only and maybe accepted or rejected by the Board.

In **Young v. Columbus Consolidated Govt. (1993)** it was held that the testimony of an employee can establish his inability to perform job duties.

In **City Marrietta v. Kirby, Ga. App 343, 436, SE, 2d 71 (1973)** it was held that the Board of the State Board of Workers Compensation is not absolutely bound to accept an expert's medical opinion even when uncontroverted. It

was held that an employee may testify about his injuries and sufferings and maybe believed over a whole college of physicians and surgeons. The finders of fact may infer from the evidence of the Claimant the effect of his injuries. The finder of fact may conclude causation, symptoms and the effect of the injuries from common knowledge: **Baker v. C. Trucking Co. (1976).**

On the medical report it has been held that the report must assist the trier of fact to understand the evidence or determine the fact in issue. Opinions must be based on reasonable degree of medical certainty or reasonable probability. The Board is the sole judge of the credibility of witnesses and the weight to be given to their testimony.

The Way Forward

The invalidity pension scheme provides a 24 hours coverage to employees against invalidity and death due to any cause not connected with employment before the age of 60 years. The ESSA 1969 being a social legislation should be interpreted liberally to effectuate the human purposes for which the ESSA was enacted. The SSAB is empowered pursuant to section 87 of the ESSA 1969 to summon and

enforce the attendance of witnesses, to compell the discovery and production of documents and material objects that may impact its determination of the appeal. The expressions and opinion of the Medical and Appellate Medical Board are to be respected and given primacy. If there is a need the SSAB should require the attendance of the Medical Officer in charge and the production of their detail report so as to execute their functions imposed on them by section 84(3) that is to decide in accordance with the decision of the Medical Board or the Appellate Medical Board as the case maybe. And if in any one given case there is evidence to suggest that the medical evidence or report is not well-thought of or reasoned and does not support the findings then the SSAB ought to call for a review or further investigation to be carried out in respect of the aggrieved workman. In this way whatever the conclusion all parties may be able to be at ease knowing that the decision was a just one.

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24 January 2015

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